No. 93-1636

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

TOM SWINT, *et al.*,
Petitioners,

v.

CHAMBERS COUNTY COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

ROBERT B. MCDUFF*
771 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

CARLOS A. WILLIAMS
Post Office Box 306
Mobile, Alabama 36601
(205) 434-2478

BRYAN STEVENSON
BERNARD HARCOURT
114 North Hull Street
Montgomery, Alabama 36104
(205) 269-1803

Counsel for Petitioners
**Counsel of Record*

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This supplemental brief is filed in response to the October 31, 1994 order of this Court instructing the parties to address the following issue:

> Whether the Eleventh Circuit, by virtue of its jurisdiction to review the District Court's denial of the individual defendants' motions seeking summary judgment on the basis of qualified immunity, also had jurisdiction to review the District Court's denial of the Chambers County Commission's motion for summary judgment.

STATEMENT OF THE CASE

In the District Court, several defendants moved for summary judgment and, for the most part, the motions were denied. One of the motions came from the Chambers County Commission, contending there was no county liability because the Sheriff of Chambers County was not a final county policymaker. The district court denied the motion, holding that the sheriff "may have been the final policy maker for the County," pet. app. 67a; *Swint v. City of Wadley, Alabama*, No. 91V-965-E (M.D. Ala. June 2, 1992), but added in a subsequent opinion that it would revisit the issue prior to trial. Pet. App. 72a; *Swint v. City of Wadley, Alabama*, No. 91V-965-E (M.D. Ala. June 26, 1992).

All of the individual defendants appealed the denials of summary judgment, raising qualified immunity issues pursuant to *Mitchell v. Forsyth*, 472 U.S. 511 (1985). At the same time, the Chambers County Commission appealed the denial of summary judgment on the county liability issue, arguing that the denial met the "collateral order" doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and arguing alternatively that the Court of Appeals could consider the issue under its discretionary pendent appellate jurisdiction. *Swint v. City of Wadley, Alabama*, No. 92-6574 (11th Cir.), Brief of Appellant Chambers County Commission at 25-27. In response, the plaintiffs, who were appellees in the Court of Appeals and are petitioners in this Court, noted that Eleventh Circuit precedent permitted the Court of Appeals to decide the issue through discretionary pendent appellate jurisdiction. The plaintiffs added that, in light of the qualified immunity appeals, judicial economy might best be served by appellate resolution of the question of county liability, along with the qualified immunity issues, prior to trial. *Swint v. City of Wadley, Alabama*, No. 92-6574 (11th Cir.), Brief of Appellees at 27, citing, *Stewart v.*

Baldwin County Board of Education, 908 F.2d 1499, 1509 (11th Cir. 1990).[1]

In addressing the jurisdictional issue, the Court of Appeals first held that the denial of summary judgment on the county liability question was not a "collateral order" under *Cohen*. Pet. App. 29a-30a; *Swint v. City of Wadley, Alabama*, 5 F.3d 1435, 1449 (11th Cir. 1993). However, the Court also held that it could review the issue through discretionary pendent appellate jurisdiction, citing a number of Eleventh Circuit precedents regarding the availability of pendent review and quoting 9 Moore's Federal Practice 110.25: "[O]nce a case is lawfully before a court of appeals, it does not lack power to do what plainly ought to be done." Pet. App. 30a; 5 F.3d at 1449. The Court of Appeals then concluded that it would be appropriate to excercise this discretionary jurisdiction to decide the county liability issue in the present case:

> For reasons of judicial economy, we choose to exercise our pendent jurisdiction in this instance . . . . If the County Commission is correct about the merits in its appeal, reviewing the district court's order would put an end to the entire case against the County, because there are no pendent state law claims against it.

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[1] As with the present case, the existing Eleventh Circuit precedent involved cases where discretionary pendent appellate jurisdiction was exercised to review the claims of parties in the case other than the parties whose claims were based on qualified immunity. *Schmelz v. Monroe County*, 954 F.2d 1540, 1541-1544 (11th Cir. 1992) (court reviews cross-appeal of plaintiff in addition to qualified immunity claims of defendants); *Stewart*, 908 F.2d at 1502, 1507-1508 (court reviews Eleventh Amendment claims of school board and school board members in their official capacities in addition to qualified immunity claims of school board members in their individual capacities).

Pet. App. 31a; 5 F.3d at 1449-1450.

The Court of Appeals went on to hold there is no county liability for the actions of the sheriff. Pet. App. 31a-34a; 5 F.3d at 1450-1451. At the same time, the court declined to exercise its discretionary jurisdiction over an appeal by the defendant City of Wadley -- which had raised an issue similar to that raised by the Chambers County Commission -- because the court said "the state of the record" was insufficient to decide the question of city liability for the actions of its police chief. Pet. App. 37a; 5 F.3d at 1452.

In the petition for writ of certiorari seeking review of the Eleventh Circuit's decision on county liability, and in the briefs on the merits, the petitioners have not raised the issue of the jurisdiction of the Court of Appeals. This is for reasons both legal and practical. As a legal matter, the petitioners believe the Court of Appeals did have the jurisdiction and the discretion to decide this issue. The reasons for this are set out in the argument portion of this brief.

As a practical matter, given the existence of a pretrial appeal on qualified immunity matters, the petitioners prefer for the county liability issue to be decided prior to trial, thereby saving time that otherwise would be expended in a subsequent appeal resolving the issue after an initial trial. Indeed, this is a case where both parties and the Court of Appeals agreed that judicial economy would be served by pretrial appellate resolution of the matter. In addition, now that the Eleventh Circuit, following its own precedent, has exercised its discretionary jurisdiction to address the merits, and in doing so has ruled against the petitioners on the merits, a reversal on the jurisdictional issue may well be of little practical benefit to the petitioners. The District Court already has stated it will revisit the county liability issue prior

to trial, and it will be hard-pressed to ignore an Eleventh Circuit decision holding there is no liability, even if that decision has been vacated for jurisdictional reasons. Similarly, upon any subsequent appeal, another Eleventh Circuit panel may well be disinclined to contradict the prior substantive holding of this panel, again even though the holding has been set aside on jurisdictional grounds. Thus, as a practical matter, the petitioners are likely to find themselves one or two years down the road in the same position they are in now, with no progress made on the resolution of the issue of county liability. Accordingly, they would prefer the issue be decided now.

The remainder of this brief will discuss the reasons for the petitioners' position that the Eleventh Circuit did have the jurisdiction and discretion to decide the issue of county liability.

ARGUMENT

I. ALTHOUGH NOT ALWAYS CONSISTENT, THIS COURT'S DECISIONS GENERALLY HAVE UPHELD THE EXERCISE OF DISCRETIONARY PENDENT APPELLATE REVIEW.

28 U.S.C. § 1291 provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." However, this Court has not limited the interpretation of the term "final decisions" to final judgments or other decisions ending litigation in the district courts, but instead has broadened the term to include a class of decisions "which finally determine claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate

consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546. This Court has held that claims of qualified immunity in cases under 42 U.S.C. § 1983 fit within this class of collateral orders and has permitted appeals under § 1291 from denials of summary judgment motions made by defendants raising qualified immunity. *Mitchell v. Forsyth*, 472 U.S. at 524-530. It is such an appeal by individual defendants that gave the Court of Appeals the initial jurisdiction to review the present case, and the court then proceeded also to consider the otherwise nonappealable issue raised by the Chambers County Commission.

In only a few instances have this Court's decisions touched on the issue of discretionary pendent appellate jurisdiction. Most of those decisions have upheld the exercise of pendent appellate review in the context of § 1291, although the decisions have not been totally consistent.

Perhaps the case most squarely on point is *Chicago R.I. & P.R. Co. v. Stude*, 346 U.S. 574 (1954). It actually involved two consolidated cases with the same parties, one case filed in Federal District Court and the other filed in state court and removed to the same Federal District Court. The Federal District Court granted a motion to dismiss the claim originally filed in federal court and denied a motion to remand the other claim to state court. The plaintiff in the original federal claim then filed an appeal from the dismissal order and the opposing party filed an appeal from the denial of the motion to remand the other claim to state court. The Court of Appeals assumed jurisdiction over both appeals, affirming the District Court's dismissal of the federal complaint and reversing the District Court's denial of the remand.

Certiorari was granted and, in reviewing the issue of

appellate jurisdiction, this Court held that the order dismissing the complaint in the original federal action was an appealable order. Although the Court did not say so, it is clear that the only rationale for that conclusion was that the dismissal was a "final decision" under § 1291. *Id.* at 577-578. This Court then held that the Court of Appeals had jurisdiction to consider not only the appealable final decision, but also the nonappealable denial of the motion to remand:

> [T]he cross-error, challenging the order denying the motion to remand, may be considered as assigned in a case involving an appealable order, the order dismissing the complaint and the action. This is true despite the fact that the order denying the motion to remand standing alone would not be appealable. *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 [(1940)].

346 U.S. at 578. *Stude*, then, stands for the proposition that a Court of Appeals, reviewing an appealable claim by a party under § 1291, also has the discretionary power to review an otherwise nonappealable claim raised by another party in the same case.

Deckert v. Independence Shares Corp., cited by *Stude*, also held that the Court of Appeals had jurisdiction to review an otherwise nonappealable ruling -- specifically, an order denying motions to dismiss filed by a number of parties -- because of the appeal of an order in the same case that granted an injunction against one party and therefore was appealable by that party as a result of the predecessor to 28 U.S.C. § 1292(a)(1). After discussing the statutory power to review the appeal from the injunction, the Court's opinion stated:

> [T]his power is not limited to mere consideration of, and action upon, the order appealed from. . . . [T]he Circuit

> Court of Appeals properly examined the interlocutory order denying the motions to dismiss, although generally it could consider such an order only on appeal from a final decision.

311 U.S. at 287.

Subsequent to both *Stude* and *Deckert*, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), was decided. It involved a Court of Appeals decision that reversed interlocutory District Court orders allocating 90% of the costs of a class action notice to the defendants and allowing published notice rather than individual notice to a number of class members. *Id.* at 169. In determining the appealability of the orders, this Court specifically addressed whether the order "allocating the cost of notice" was an appealable collateral order under § 1291, but did not address whether the order regarding published notice also was a collateral order. *Id.* at 169. This Court concluded that the 90% cost order was appealable under § 1291, and then said that the appealability of the 90% order also allowed review of the publication notice order because they were both "aspect[s]" of the District Court's effort to permit the case to proceed as a class action. *Id.* at 172. This allowed review of the merits of both issues. *Id.* at 172-179.

Accordingly, *Eisen* confirms that Courts of Appeals reviewing appealable collateral orders under § 1291, such as the 90% cost order, also have discretionary jurisdiction to review other nonappealable orders in the case, such as the publication notice order, particularly where they both relate to the ability of the case to proceed in one sense or another.[2]

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[2] Although *Eisen* did not speak in terms of pendent appellate jurisdiction, its holding regarding the reviewability of the otherwise non-appealable issue of publication notice certainly demonstrated the propriety and validity of the doctrine of pendent appellate jurisdiction. *See*, Note, *The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context*, 100 Yale L. J. 511, 518 (1990) ("In *Eisen* . . . , the Court appeared to sanction the extension of collateral order jurisdiction to pendent rulings.")

Three years after *Eisen*, *Abney v. United States*, 431 U.S. 551 (1977) was decided, holding that the denial of a motion to dismiss based upon double jeopardy in a criminal case was an appealable collateral order under § 1291. *Id.* at 662. However, the Court said this appealability did not extend to the denial of a pretrial motion challenging the sufficiency of the indictment. As the Court stated:

> Any other rule would encourage criminal defendants to seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals prior to conviction and sentence.

Id. at 663.

Although *Abney* held that the nonappealable claim should not be reviewed along with the appealable double jeopardy claim, *Abney* did not purport to overrule this Court's prior decisions in *Eisen*, *Stude*, or *Deckert*. Indeed, *Abney* did not even mention those decisions. At least one commentator has argued that *Abney* should not be read to abolish the notion of pendent appellate jurisdiction in all cases. "Although the Court's opinion [in *Abney*] does not consider the possibility, it should not be read to preclude consideration of noncollateral rulings when special circumstances suggest that this course would be desirable, and that there has been no attempt to abuse the collateral order appeal opportunity." 16 Wright, Miller, & Cooper, *Federal Practice and Procedure*, § 3937, p. 373 n. 5 (1994 Supp.).

Indeed, were it not for the subsequent decision in *Abney*, this Court's decisions in *Stude* and *Eisen* would control this issue, both holding that Courts of Appeals have the discretion under § 1291 to review nonappealable issues raised by parties to the litigation along with those appealable matters that provide the jurisdiction for the appellate court to consider the case in the first place. As explained in Section III of this brief, this view is in keeping with the purposes and language of § 1291, and with the principles governing this Court's interpretation of § 1291 over the years.

Abney can be reconciled with this view and with *Stude* and *Eisen*. The portion of *Abney* quoted above suggests that this Court, in its supervisory power over the Courts of Appeals, was fashioning a prudential rule to govern and prevent the exercise of pendent appellate jurisdiction in criminal cases rather than abolishing the notion of pendent appellate jurisdiction in all cases, civil and criminal. Such a course would naturally follow from this Court's prior expressions of concern about the particular dangers of creating exceptions to the final judgment rule in criminal cases.

> Despite the[] statutory exceptions to, and judicial construction of, the requirement of finality, "the final judgment rule is the dominant rule in federal appellate practice." 6 Moore's Federal Practice (2d Ed. 1953), 113. *Particularly this is true of criminal prosecutions.* . . . [T]he delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law.

DiBella v. United States, 369 U.S. 121, 126 (1962) (emphasis added). This construction of *Abney* also would explain the failure of *Abney* to discuss this Court's prior holdings in the civil cases of *Eisen* and *Stude* to the effect that pendent

appellate jurisdiction is available.

At the same time, however, *Abney* also can be read as a limitation on jurisdiction rather than a prudential decision, particularly given its conclusory statement that the Court of Appeals in that case "had no jurisdiction" to review the sufficiency of the indictment.[3] If that is the case, *Abney* can be reconciled with *Eisen* and *Stude* only if *Abney*'s jurisdictional interpretation is limited to criminal cases. It is certainly possible to do that, particularly given the statement of this Court in *DiBella*, quoted above, that the final judgment rule is more strictly enforced in criminal than in civil cases.

However, if *Abney* is construed to govern both criminal and civil cases, and is construed to prohibit pendent appellate jurisdiction, it is inconsistent with the prior decisions in *Eisen* and *Stude*. For the reasons given in Section III of this brief, the holdings in *Stude* and *Eisen* are much more in keeping with the purposes and interpretation of § 1291 than *Abney*. Accordingly, if *Abney* is to be read in such a fashion, it should be overruled to that extent. *See*, *Swift & Co. v. Wickham*, 382 U.S. 111, 116, 128 (1965) (overruling a prior decision because that decision was in conflict with earlier precedent and was inconsistent with the structure and historical purpose of the relevant statute); *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (overruling a prior decision in part because it created a "dissonance of doctrine" in light of an earlier and more persuasive decision).

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[3] This Court's subsequent opinion in *United States v. MacDonald*, 435 U.S. 850, 857 n. 6 (1978) described *Abney* as concluding "that a federal court of appeals is without pendent jurisdiction over otherwise nonappealable claims even though they are joined with a double jeopardy claim over which the appellate court does have interlocutory appellate jurisdiction."

II. MOST OF THE COURTS OF APPEALS HAVE HELD THAT THEY HAVE THE AUTHORITY TO EXCERCISE DISCRETIONARY PENDENT APPELLATE REVIEW.

In the wake of this Court's decisions, most of the Courts of Appeals have concluded that they do have the power to exercise pendent appellate review on a discretionary basis, although there is some division among them. One commentator has stated:

> Despite . . . *Abney*, the propriety of pendent appellate jurisdiction remains an open question. Perhaps *Abney*'s failure to address the conflicting views expressed in *Eisen*, or to consider the main justifications set forth by those circuits that exercise an expanded scope of collateral order review, is responsible for the persisting debate. But for whatever reason, the appellate courts continue to evince widely differing attitudes . . . toward the appropriate bounds of their authority when faced with an interlocutory appeal under *Cohen*.

Note, *The Proper Scope of Pendent Appellate Jurisdiction*, 100 Yale L.J. at 519.

In addition to the Eleventh Circuit, the Second, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits all have recognized the authority and discretion, in certain circumstances, to consider otherwise nonappealable claims once jurisdiction has been established in a case through a valid interlocutory appeal. *See*, *Natale v. Town of Ridgefield*, 927 F.2d 101, 104 (2nd Cir. 1991) (recognizing authority to hear nonappealable claims of one party along with the appealable claim of another, but declining to exercise it); *McCowan v. Sears, Roebuck & Co.*, 908 F.2d 1099, 1004 (2nd Cir. 1990) (when jurisdiction existed with respect to

claim of one party but not another, court exercised pendent jurisdiction to hear both claims); *O'Bar v. Pinion*, 953 F.2d 74, 79-80 (4th Cir. 1991); *Roberson v. Mullins*, 29 F.3d 132, 136 n.6 (4th Cir. 1994); *Metlin v. Palasta*, 729 F.2d 353, 355 (5th Cir. 1984); *Foster v. Walsh*, 864 F.2d 416, 418 (6th Cir. 1988) (reviewing otherwise nonappealable issue regarding § 1983 claim against government entity along with appealable issue regarding qualified immunity of individual defendants); *Patterson v. Portch*, 853 F.2d 1399, 1403 (recognizing the appellate power to consider a nonappealable issue involving a party to the case along with an appealable issue in which that party is not involved, but declining to exercise that power in the particular case); *Moreno v. Small Business Admin.*, 877 F.2d 715, 176 (8th Cir. 1989); *Walter v. Morton*, 33 F.2d 1240, 1242 (10th Cir. 1994) (acknowledging pendent appellate jurisdiction to hear otherwise nonappealable claim of municipality along with appealable qualified immunity claims of individual defendants, but declining to exercise it); *Primas v. City of Oklahoma City*, 958 F.2d 1506, 1512 (10th Cir. 1992) (reviewing nonappealable claim of a cross-appellant along with the appealable claim of the appellant regarding qualified immunity).

By contrast, the Third Circuit has held that pendent appellate jurisdiction is not available, *Kershner v. Mazurkiewicz*, 670 F.2d 440, 447 (3rd Cir. 1982) (en banc), the First Circuit has yet to decide the the availability of pendent jurisdiction but has created a "self-imposed" rule against its exercise, *Roque-Rodriguez v. Lema Moya*, 926 F.2d 103, 105 n.2 (1st Cir. 1991), the Ninth Circuit has allowed it in a civil case but not in criminal cases, *Marathon Oil Co. v. United States*, 807 F.2d 759, 764 (9th Cir. 1986); *United States v. Yellow Freight System, Inc.*, 637 F.2d 1248, 1251 (9th Cir. 1980), and the District of Columbia Circuit has left the issue open while expressing doubt about the availability of pendent appellate jurisdiction. *Gross v. Winter*,

876 F.2d 165, 168 n.3 (D.C. Cir. 1989).

III. THE PURPOSES OF § 1291, AND THE PRINCIPLES OF INTERPRETATION FOLLOWED BY THIS COURT OVER THE YEARS WITH RESPECT TO § 1291, DEMONSTRATE THAT COURTS OF APPEALS HAVE THE POWER OF DISCRETIONARY PENDENT APPELLATE REVIEW IN CASES THAT ARE APPEALABLE UNDER § 1291.

A. § 1291 Has Been Interpreted By This Court In A Practical And Flexible Manner Rather Than A Literal Manner.

The language of § 1291 speaks in terms of "final decisions." Of course, if taken literally, the term "final decision[]" would mean the *last decision* in a case, whether a final judgment, a denial of a motion to alter or amend, or an order regarding attorneys' fees. But § 1291 has not been interpreted literally. "[A] decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case." *Mitchell v. Forsyth*, 472 U.S. at 524, *quoting*, *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964). For the most part, the term "final decision[]" has been interpreted to mean the equivalent of a final judgment. "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988), *quoting*, *Catlin v. United States*, 324 U.S. 229, 233 (1945).

However, limiting appeals only to final judgments would prove unworkable. "Recognition of the shortcomings inherent in a rigid application of the final judgment rule has led to the promulgation of exceptions by both Congress and the courts."

Note, *The Proper Scope of Pendent Appellate Jurisdiction*, 100 Yale L.J. at 513. Congress, through enactment of 28 U.S.C. § 1292(a) and (b) has created avenues of interlocutory appeal for orders relating to injunctions and orders that are deemed sufficiently important by both the District Court and the Court of Appeals to merit interlocutory review through certification. In addition, Rule 54(b) of the Federal Rules of Civil Procedure allows for a District Court to permit an immediate appeal of any order adjudicating a specific claim, or the claims of a specific party, even though other claims or parties remain in the case.

But this has not been enough to cure the potential inefficiency and unfairness of the final judgment rule.

> The provisions [of § 1292 and Rule 54(b)] fall far short of covering the variety of situations in which a rigid adherence to the final judgment rule might produce serious inefficiency or injustice. Section 1292(a) applies only to injunctive relief, while section 1292(b) and rule 54(b) are limited to civil actions involving complex issues or parties and contain restrictive certification procedures. The courts have responded by formulating exceptions of their own to the final judgment rule, the most important of which is the collateral order doctrine.

Id. at 514-515. With the collateral order doctrine, this Court has interpreted the phrase "final decisions" in § 1291 to also include interlocutory orders "which finally determine claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. at 546. Although *Cohen* is based upon an interpretation of the language of § 1291, it is basically a judge-made exception to

the final judgment rule. *See, Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467-468 (1978) (referring to "the 'collateral order' exception articulated by this Court in *Cohen*").

The flexibility demonstrated by this Court in *Cohen* follows from the principle, adopted and often repeated by this Court, that § 1291 is to be given a "practical rather than a technical construction." *Eisen v. Carlisle & Jacquelin*, 417 U.S. at 171, *quoting*, *Cohen*, 337 U.S. at 546. As this Court has stated with respect to § 1291, "[t]he considerations that determine finality are not abstractions but have reference to very real interests -- not merely those of the immediate parties, but, more particularly, those that pertain to the smooth functioning of our judicial system." *Budinich v. Becton Dickinson & Co.*, 486 U.S. at 196, *quoting*, *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 69 (1948).

B. The Purpose of § 1291, As Passed By Congress And Interpreted By This Court, Is To Prevent Unnecessary Piecemeal Appeals While At The Same Time Allowing The Smooth Functioning Of The Judicial System, And Discretionary Pendent Appellate Review Promotes That Statutory Purpose.

It is quite obvious that the purpose of § 1291 is to limit appeals so that parties cannot, at will, interrupt the trial court proceedings and impose upon the time of appellate courts in order to obtain appellate review of every adverse trial court decision.

> In § 1291 Congress has expressed a preference that some erroneous trial court rulings go uncorrected until the appeal of a final judgment, rather than having litigation punctuated by "piecemeal appellate review of trial court decisions which do not terminate the litigation." *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982).

Richardson-Morrell, Inc. v. Koller, 472 U.S. 424, 430 (1985).

At the same time, this Court's practical construction of the finality concept of § 1291 has focused specifically on the underlying interests behind the statute -- interests that, as this Court has stated, "pertain to the smooth functioning of our judicial system." *Budinich v. Becton Dickinson & Co.*, 486 U.S. at 196, *quoting*, *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. at 69. Thus, in interpreting § 1291, it is appropriate to look not only at the congressional intent of limiting piecemeal appeals, but also at the purpose of promoting the smooth and efficient operation of the judicial system.

Discretionary pendent appellate review under § 1291 promotes those purposes by increasing the efficient functioning of the federal judicial system without increasing piecemeal appellate review. By its very nature, the exercise of discretionary pendent review occurs only when a valid interlocutory appeal already is in place under § 1291. Accordingly, the pendent appellate review does not increase the number of piecemeal interlocutory appeals.

Moreover, it allows appellate courts the discretion to resolve interlocutory issues when the resolution will contribute to the speedy and efficient handling of the overall litigation, as well as the discretion to decline to resolve the issues when that goal will not be served. As the Eleventh Circuit noted, once the case is lawfully before the Court of Appeals, the doctrine of pendent appellate jurisdiction gives the Court the "power to do what plainly ought to be done." *Stewart v. Baldwin County Board of Education*, 908 F.2d at 1509, *quoting*, 9 Moore's Federal Practice 110.25. It also accords the flexibility to avoid unnecessary expenditures of

judicial resources down the road. As Judge Friendly noted in *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1201 (2nd Cir. 1970), when an appellate court already has interlocutory jurisdiction of the case, "it would be absurd to require the court to close its eyes to another interlocutory order which, though not itself appealable, might infect the entire proceeding with error and thus require reversal after a large expenditure of judicial and professional time."

In the present case, once an interlocutory appeal was taken, thereby halting proceedings in the District Court, the parties on both sides of the pendent county liability issue asserted that appellate resolution of the issue would promote judicial economy. After reviewing these contentions, the Court of Appeals agreed, stating that if the defendants' position on the merits of county liability was correct, it "would put an end to the entire case against the County." Pet. App. 31a; 5 F.3d at 1450. This is the sort of situation where the option of discretionary pendent appellate review increases the power of the Court of Appeals to prevent needless delay and expenditure of resources, and to promote the smooth and efficient functioning of the judicial system consistent with the purposes of § 1291.

None of the Courts of Appeals that currently exercise discretionary pendent review seem to have overused it, and it is doubtful that any would. Federal Courts of Appeals are very busy as it is, and there is no reason or inclination for them to reach out for discretionary pendent issues unless the interlocutory resolution of those issues will save time and promote efficiency.

C. Nothing In The Language Of § 1291 Precludes Discretionary Pendent Appellate Review.

The language of § 1291 provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts . . . ." As noted previously, that language has not been interpreted literally. If it had been, "final decisions" would mean the last decision in each case.

Moreover, once jurisdiction has been established, the language has not been interpreted to limit the scope of review to those "final decisions." The majority of "final decisions" appealed under § 1291 are case-ending decisions -- final judgments -- yet it is clear that the scope of appellate review is not confined to the narrow terms of those "final decisions," but instead can include all prior decisions made in the case. *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981). For example, if a final judgment on a jury verdict awards damages against one defendant and not another, but the second defendant was also required earlier in the case to pay a monetary sanction for a discovery violation, the appeals of the final judgment can include not only the first defendant's challenge to the jury award , but the second defendant's challenge to the prior monetary sanction as well.

Thus, nothing in the language or interpretation of § 1291 requires that a Court of Appeals, having obtained jurisdiction of the case, limit the scope of its appellate review to the specific appealable "final decision" that created the jurisdictional avenue in the first place. Whether that "final decision" is a final judgment or a collateral order, a practical construction of § 1291 would permit the appellate court to exercise authority to review otherwise nonappealable decisions in the case when appropriate.

D. Whether Discretionary Pendent Appellate Review Is Available Under § 1292(a) or (b) Is Not Controlling On The Issue Of Whether It Is Available Under § 1291.

Because the appeal in this case arose under § 1291, this brief has focused on whether discretionary appellate review is available consistent with that statute. This Court need not address whether such review would be available under § 1292(a), which governs appeals relating to injunctions, or § 1292(b), which governs certified appeals.

However, it should be noted that § 1291 seems to present the strongest case for discretionary review, particularly given the practical rather than technical interpretation of § 1291, the non-literal construction of its language, the willingness to create judge-made exceptions to the final judgment rule within § 1291, and the focus on the smooth functioning of the judicial system in the interpretation of the statute. These factors do not seem to play as prominent a role in the interpretation of § 1292(a) or (b), which are more narrowly drawn than § 1291 and were designed by Congress to address more specific situations.[4]

With respect to § 1292(b), this Court held in *United States v. Stanley*, 483 U.S. 669, 676-677 (1987), that the scope of appellate review under that statute is limited to the certified order, while issues arising in other orders may not be considered unless they also are certified. *Stanley* does not

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[4] As noted earlier, this Court's 1940 decision in *Deckert v. United States*, 311 U.S. at 287, involving the predecessor to § 1292(a), held that discretionary pendent review would be available on the appeal of an injunction. It is not necessary for this Court to address that issue further in the context of the present case.

answer the question in the present case, in part for the reasons just mentioned regarding the distinctions between § 1291 and § 1292(b). In addition, the language and structure of § 1292(b) provide that both the District Court and the Court of Appeals play indispensable roles in deciding which orders should be reviewed, and therefore the Court of Appeals cannot, by itself, exercise discretion to expand the scope of review beyond what the District Court certified. This limitation does not exist in connection with § 1291.

CONCLUSION

All of the foregoing points toward a practical construction of § 1291 that permits the Courts of Appeals to save time and promote efficiency by resolving, when appropriate, otherwise nonappealable issues in cases where the Courts already have appellate jurisdiction. For these reasons, and on the basis of the authorities cited, the Court of Appeals in the present case had the authority to resolve the county liability issue as part of the interlocutory appellate review in the case. Accordingly, this Court should also review and resolve the county liability issue on its merits.

Respectfully Submitted,

ROBERT B. McDUFF*
771 North Congress Street
Jackson, Mississippi 39202
(601) 969-0802

CARLOS A. WILLIAMS
Post Office Box 306
Mobile, Alabama 36601
(205) 434-2478

BRYAN STEVENSON
BERNARD HARCOURT
114 North Hull Street
Montgomery, Alabama 36104
(205) 269-1803

Counsel for Petitioners
* Counsel of Record